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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

ABRAHAM RODRIGUEZ,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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KIT CONELLY DECIOUS

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Abraham Rodriguez,

Petitioner,

The People of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Petitioner, Abraham Rodriguez, respectfully prays that a writ of certiorari issue to review the certificate of the Court of Appeals of New York, issued on February 16, 1984, denying leave to appeal the order of the Appellate Division of the Supreme Court, Fourth Judicial Department,

which affirmed the judgment of conviction of Petitioner upon retrial in the Supreme Court, County of Wayne, on one count of arson, second degree, while vacating the sentence imposed upon said retrial, which was held pursuant to an earlier reversal of Petitioner's conviction after his first trial on the charge of second degree arson.

QUESTIONS PRESENTED

1. Was Petitioner denied a fair trial as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution through his successive convictions under New York statutory law, of crimes for which he was neither charged nor tried, as follows:

a) where the first judgment of conviction of arson was based upon a prosecutorial theory which incorporated an element of crime (aiding and abetting) contained in a separate statutory provision from that on which the indictment was based, and,

b) where a second judgment convicted Petitioner as an accessory under circumstances showing he was in fact tried for alleged complicity in an uncharged, continuing conspiracy alleged to extend to other crimes as well as to that in which Petitioner was asserted to have acted as accessory, and,

c) where the evidence presented at both trials, when viewed in a light most favorable to the prosecution, was insufficient to prove Petitioner guilty of either the crime for which he was indicted or that which the prosecutor asserted he sought to prove.

2. Is reversal of a defendant's conviction on ground that evidence, which was admitted at trial and without which the verdict cannot stand as a matter of law, which admission is held on appeal to have been erroneous for failure of the prosecution to show to a sufficient degree its reliability, a reversal based upon insufficiency of the evidence barring retrial under the recent Double Jeopardy decisions of this Court?

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OPINIONS BELOW

Petitioner was found guilty on June 18, 1979, of the crime of arson, second degree, after a trial by jury in County Court, Wayne County. The trial court did not file an opinion when judgment of conviction was entered.

The judgment of conviction was reversed by the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department. The Appellate Division's memorandum opinion of October 30, 1980, is reported at 78 A.D. 2d 769, and is set out in the Appendix.

Petitioner was retried upon the same indictment in Supreme Court, Wayne County, after remand to and transfer from, County Court. Petitioner was again found guilty of second degree arson on April 16, 1981, after a trial by jury. The trial court did not file an opinion when judg-

ment of conviction was entered.

The judgment of conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, but the sentence was vacated and the matter remanded for re-sentencing. The Appellate Division's memorandum opinion of December 16, 1983 is reported at 98 A.D. 2d 961, and is set out in the Appendix.

Petitioner sought permission to appeal to the Court of Appeals of the State of New York, which application was denied by certificate dated February 16, 1984, which is set out in the Appendix. No order or opinion accompanied this determination, which is unreported.

JURISDICTION

The judgment of conviction was entered by the trial court on June 18, 1979. The judgment of conviction was reversed on October 30, 1980 and remanded, resulting in a second judgment of conviction after retrial, entered by the trial court on April 16, 1981. This judgment was affirmed by judgment of the Appellate Division entered December 16, 1983. The Court of Appeals' decision not to hear the matter was rendered February 16, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Constitutional Provisions:

U.S. Const. Amend. 5

U.S. Const. Amend. 6

U.S. Const. Amend. 14 §1

United States Statutes:

28 U.S.C. § 1257(3)

New York State Statutes:

Penal Law § 20.00

Penal Law § 150.15

Criminal Procedure Law § 60.22

Criminal Procedure Law § 200.70

(For complete text of relevant statutes, see Appendix, infra, page A-29)

STATEMENT OF THE CASE

On August 16, 1978, the "Villani Building", located in the historic Water-Broad Street area of the Village of Lyons, burned as the result of arson. Villani, the Village Attorney, was one of a group of officials who had pursued funding for a redevelopment scheme aimed at the Village's landmark historic area adjoining the Erie Canal. The scheme, which resulted in the wholesale ouster of local property owners, businesses and residents and the destruction of almost a dozen buildings, primarily by fire, was opposed by Petitioner Abraham Rodriguez, a militant farmworker of more than 15 years residence in the Village. Rodriguez had successfully organized community opposition which sought to halt the scheme's continuation and

funding through judicial and administrative appeals as well as peaceful protest aimed at securing relocation assistance for area residents.

The "Villani Building" fire, as well as the majority of the other fires in the historic district, had been admittedly set by one Harold "Buddy" Mann, a former Villani employee who was facing, by his own testimony, some 135 years imprisonment for his crimes. Mann sought leniency from the Federal Bureau of Investigation, in return for which he alleged that he was part of a conspiracy to commit these crimes and that he would testify against others, also part of the conspiracy.[1]

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1. By information obtained by Petitioner through discovery, Petitioner is informed that Mann alleged a wide-ranging conspiracy involving Petitioner as an active participant. With the exception of the charge herein, Petitioner knows of no credence given to this theory by law en-

In an attempt to corroborate his theory, Mann twice engaged Petitioner in conversation, on September 8, 1978 and September 15, 1978, taping both conversations without Petitioner's knowledge. In these conversations, Mann discussed several of the fires which had occurred in the Village, as well as proposals for future crimes, such as "finishing" the Villani building, which crimes of course never took place.

Although he had a clear opportunity to raise the "Villani Building" fire of August 16, 1978 directly with Petitioner, Mann did not do so. Petitioner and Mann did discuss money which Petitioner owed to Mann, although they did not specify for what the money was owed.

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forcement officials; no one but "Buddy" Mann was ever charged with any of the other crimes, and Petitioner categorically states that Mann's allegations of conspiracy are untrue.

Petitioner was indicted on October 3, 1978 for one count of violation of New York Penal Law § 150.15, Arson in the Second Degree, charged with having "intentionally damaged the building of Anthony Villani by starting a fire...".

Petitioner was, in fact, working at his regular place of employment, Marion Foods cannery, on the night of the "Villani Building" fire. The prosecution therefore pursued a theory that Petitioner Rodriguez had solicited Mann to set the fire, although the prosecution did not seek a new indictment reflecting this theory.[2]

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2. Petitioner's counsel duly objected and formally moved to dismiss the indictment after the People's opening statement stating his position that the indictment could not sustain the new charge. His motion was denied by the trial Judge (T. I, 53). Later, when the Judge charged the jury on Penal Law § 20.00, not mentioned in the indictment, counsel took exception once again (T. I, 364, 490-1).

The only testimony supporting the theory of agreement between Petitioner and Mann was that of Mann himself. Although they contained no admissions of Petitioner and no proof regarding the "Villani Building" fire on August 16, 1978, the tapes, small portions of which had been redacted, were introduced at trial over strenuous objections of the defense. Petitioner was convicted on June 18, 1979, and Petition-

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On appeal of the first conviction, the validity of the indictment was challenged by Appellant, citing to this Court's decision in U.S. v. Cruickshank, 92 U.S. 542 (App. Br. I, 5). On retrial, the same indictment was presented, and Petitioner's counsel moved to dismiss on papers dated Nov. 25, 1980. The objection was raised again at the close of the evidence (T. II, 1111-1118). On appeal, the invalidity of the indictment was raised again. In each instance, the question was decided adversely to Petitioner.

er's motions to dismiss on grounds of insufficiency of the evidence and inadequacy of the indictment were denied.

The Appellate Division reversed, holding that "the foundation for admission of the tapes was insufficient". The tapes had been the only evidence introduced at trial which purported to corroborate Mann's testimony that Petitioner requested he commit the arson for pay. Since such corroboration of "accomplice testimony" is mandatory under New York Criminal Procedure Law § 60.22 (see Appendix) the verdict was erroneous as a matter of law.

The Appellate Division further directed that, "If the tapes are admitted upon retrial, the Court should scrutinize the tapes and redact those portions which in its opinion are not relevant as admissions or proof of the crime in question

and which relate to uncharged crimes". (See Appendix for full text of the decision of October 30, 1980).

With Petitioner rejecting offers to plead guilty for time served, the matter returned to trial.

Upon hearing the motion to redact the tapes on January 26, 1981, the trial court failed to follow the Appellate Division's instructions. The prosecution pursued a "continuing conspiracy" theory in order to argue that portions of the tapes be retained and introduced into evidence.[3]

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3. Petitioner's counsel objected to the failure to redact portions of the tapes dealing with material alleged to be relevant to this new "conspiracy" theory. (See T. 1/26/81, 11-12, 15-16). These objections were overruled. It must be noted that throughout the first 16 pages of hearing the Judge was of the belief that the conversations in question took place before the arson was committed, which was totally incorrect. He changed none of his previous determinations when apprised of his fundamental error.

As a result, portions of the tapes concerning other alleged crimes, including other fires which had occurred in the Village and possible future acts, were retained over defense counsel's objections. Petitioner very easily could have been convicted of soliciting a crime which never occurred, rather than the crime charged in the indictment, since the tapes still contained no admissions by Petitioner and no proof either regarding the August 16, 1978 arson or accessorial conduct with regard thereto.

At the second trial, Petitioner, in his own defense, objected on the grounds of double jeopardy, which the trial court overruled (T. II, 121). Facing uncontrovertible evidence that Petitioner was at work when the fire was set, Mann again provided the only testimony of any

agreement between him and Petitioner that he would commit the arson charged. The tapes were admitted upon Mann's testimony that they were "fair and accurate representations" of his conversations with Petitioner.[4]

Again, the prosecution failed to seek a new indictment or amend the old. The Court's charge to the jury made almost no reference to the facts of the case, and failed utterly to set forth the material elements of crime required to be proved beyond that stated in the indictment.

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4. A great number of objections were raised at trial to the authenticity of the tapes and the circumstances under which they were made. No one else being present, Mann, the alleged accomplice, was the only person who could authenticate the tapes so as to provide a basis for their admission into evidence.

On appeal, the Appellate Division affirmed Petitioner's conviction, but modified the sentence on the grounds set forth in this Court's decision of North Carolina v. Pearce, 395 U.S. 711. In its decision, the Court did not address the questions raised herein, which were raised by Petitioner -- below with regard to double jeopardy, and on appeal with regard to due process.

Petitioner sought leave to appeal to the New York Court of Appeals, which application was denied.

Petitioner still maintains his innocence of all crimes, and has served nearly six years during the pendency of these proceedings.

Petitioner prays that a writ of certiorari be granted for the reasons that follow.

REASONS FOR GRANTING THE WRIT

This Petitioner raises a substantial Constitutional question not heretofore decided by this Court as well as substantial Constitutional questions decided by the appellate courts of the State of New York in conflict with applicable decisions by this Court, the determination of which, by virtue of the unconstitutional manner of application of criminal sanctions under the statutes of New York State affects the rights of hundreds of Defendants every year.

This Petition will show this Court that New York, through the decisions of its Appellate Courts, has seen fit to permit successive convictions of Petitioner to stand as against attacks against its practice of permitting prosecutors to change their trial theories amid-proceedings, a practice proscribed by that

States' own statutory provisions, as well as the Bill of Rights, and as against attacks upon its practice of permitting repeated prosecution after appellate reversal on grounds of evidentiary insufficiency. Said practices stand against the settled law of the land as pronounced by this Court, and deny due process to defendants throughout the State.

I

A. Petitioner was tried and retried upon an indictment accusing him of arson in the second degree, to wit: having "intentionally damaged the building of Anthony Villani by starting a fire when another person not a participant in the crime was present in the building at the time,...".

At trial it appeared that petitioner could not have started the fire himself,

since he was uncontrovertibly shown to have been at work at the time. The prosecution then changed its theory of liability, asserting that the Petitioner had previously made a deal with one Harold "Buddy" Mann to pay the latter to set the blaze. Counsel for Petitioner objected, as New York law does not permit such a change in prosecutorial theories without securing a new indictment. See New York Criminal Procedure Law §200.70, set forth in the Appendix which requires that the presecution amend the indictment to reflect any variances between charge and proof. Where the change involves a change in prosecution theory, a new indictment is required. New York Criminal Procedure Law §200.70(2). Switching theories from defendant as perpetrator of the acts constituting the crime to defendant as

an accessory before the fact who solicits another to act in perpetration of the crime is such a change requiring a new indictment. People v. Hill, 102 Misc 2d 814, 424 NYS 2d 655 (1980). The defendant must be tried on the theory expressed in the original indictment or be tried on a proper superseding indictment. People v. Boyd, 59 A.D. 2d 558, 399 NYS 2d 150 (1977).

The requirement that a defendant be tried upon the theory expressed in the indictment is of Constitutional proportions. Cole v. Arkansas, 333 U.S. 196, 201 (1948). To allow the prosecution to amend the indictment at trial and thus seek conviction on a charge not brought by the grand jury unquestionably constitutes denial of due process. Watson v. Jago, 558 F.2d 330 (6th Cir., 1977). Gregory v. Chicago, 394 U.S. 111, 112

(1969).

The trial court overruled petitioner's objection, citing New York Penal Law, §20.00, which permits accessories to be charged for crimes as principals. However, in the instant case, this represented an entirely different theory of liability and added an additional element to be proved - that of solicitation of "Buddy" Mann by petitioner. It was precisely this element which the prosecutor failed to prove. Thus, this section did not remedy the defect in the indictment. People v. Hill, supra.

An appeal after conviction on this accessorial theory, the Appellate Division reversed, but did not reach the issue herein raised, an which was raised by motion to dismiss and in Petitioner's breif on appeal. Rather, the Appellate Division reversed on the ground that the

prosecution failed to produce sufficient foundation for admissibility of the only evidence which purported to corroborate the testimony of "Buddy" Mann, the redacted tapes. This left Mann's testimony as the only evidence of petitioner's solicitation of him, change in theory, and it was insufficient as a matter of law. New York Criminal Procedure Law §60.22. See Appendix.

The Appellate Division's failure to reach the question of the indictment caused petitioner to be retried upon the same indictment, consituting a clear denial of due process of law.

The existence of a separate statute, not mentioned in the charging instrument, equating the liability of principal and accessory, does not convert one into the other. The prejudice caused by the Appellate Court's failure to rule on the

question was manifold - it created confusion for the jury and it interfered with Petitioner's preparation for trial. Petitioner was thus denied his Sixth Amendment right to be informed of "the nature and cause of the accusation" against him. Russell v. United States, 369 U.S. 749 (1962), United States v. Cruikshank, 92 U.S. 542 (1876). Most importantly, however, it precluded the addressment of what crime was actually being charged - no evidence except an alleged accomplice's bold assertion supported a finding that any agreement was made to commit the crime of arson for hire. Yet the attention of judge and jury alike were rooted upon the fire itself as the operative transaction.

Upon retrial, the court mentioned New York Penal Law §20.00 in his charge. However, he never mentioned solicitation or

any accomplice relation as a separate element which required proof beyond a reasonable doubt. He merely read the statute and then stated:

> In order to find the Defendant, Abraham Rodriquez, guilty, you must find that he, in fact, solicited Harold Mann to set the fire of the Villani Building on Broad Street in the Village of Lyons in Wayne County and that Harold Mann did, in fact, set the fire as a result of that solicitation. (T. II, 1147-1148).

The charge to the jury provided no specifics as to when and where the solicitation was to have occurred, or even what "solicitation" meant. The charge did not even specify that the solicitation had to be for the arson of the Villani Building which occurred on August 16, 1983.

In his only other mention of the accessory theory, the trial judge made it clear in his charge that he did not con-

sider the "solicitation" a separate element to be proved beyond a reasonable doubt.

> So you consider that Section 20 when you're considering both of these sections (arson in the second degree and arson in the third degree)...
>
> If the People have failed to prove the material elements of the crime charged in either (emphasis added) of those sections, then your duty would be to find the Defendant not guilty or to acquit the Defendant.

The Court ended its charge to the jury at this point, focusing the jury's attention upon facts not in dispute - that the Villani Building was burned by a fire intentionally set and that it was occupied by a tenant at the time. What was in dispute was petitioner's relationship to the fire, if any, and neither the indictment nor the judge's charge to the jury provided any guidance as to determination

of the critical question of fact before the jury. Both had been obscured by the prosecution's change in theory of culpability. The fact that the second verdict was based upon legally insufficient evidence went unnoticed by judge and jury. In sum, the prosecutor was thus permitted to procure a guilty verdict without being required to proved each and every material element of the crime charged beyond a reasonable doubt, as is required by the 5th and 14th Amendments to the Constitution of the United States. In re Winship 397 U.S. 358, 364 (1970), Sandstrom v. Montana, 442 U.S. 510, 523 (1979), Mullaney v. Wilbur, 421 U.S. 684, 704 (1975).

B. At the redaction hearing on January 26, 1981, the persecution again changed its theory - to one of "continuing con-

spiracy" between petitioner and Mann regarding a series of arsons in Lyons. By this device, the prosecution procured admission of portions of the taped conversation regarding uncharged crimes and proposed crimes. The resulting confusion of all parties was demonstrated by the trial judge who ruled based on his understanding that the taped conversations occurred before the Villani Building fire rather than three weeks to one month after.

Petitioner was never charged with conspiracy. The jury was never instructed as to the meaning of the words "solicitation", "conspiracy" or "accessory". Nor was it ever made clear the difference between the arson charged and the subjects of the tapes which were clearly not the arson charged. Petitioner, tried for a crime not charged and convicted of a

charge not tried was denied due process under the decisions cited in Section A above.

Moreover, the vague jury instructions resulting from the confused proof substantially at variance with indictment operated to shift the burden of proof to petitioner to demonstrate that his association with Mann was an innocent one, contrary to his constitutional right to have the prosecution prove all elements of crime beyond a reasonable doubt as guaranteed by due process of law. In re Winship, supra, Sandstrom v. Montana, supra, Addington v. Texas, 441 U.S. 418 (1979), Gregory v. Chicago, supra.

In fact, the likelihood is that, based upon the record, the jury convicted Rodriguez of soliciting a crime which was never committed.

C. The prosecution utterly failed to

prove the charge set forth in the indictment. Further, it failed to prove petitioner's guilt pursuant to its second theory - that of petitioner as accessory before the fact. The testimony of "Buddy" Mann, uncorroborated, was insufficient as a matter of law to sustain conviction. Thus petitioner's conviction was secured upon a ground neither charged nor enunciated by the prosecution as that which it sought to prove.

II.

Petitioner's appeal from his first conviction for arson in the second degree resulted in reversal. (Decision of October 30, 1980; see Appendix for full text.) In a unanimous opinion the Appellate Division held that the foundation for admission of tape recorded evidence was insufficient and that it was error to present it to the jury. This ruling left the uncorroborated testimony of "Buddy" Mann as the only evidence of petitioner's participation in the arson, evidence which by New York Criminal Procedure Law, §60.22 was insufficient as a matter of law.

The matter was remanded for retrial, with the Court issuing instructions as to how the defect could be remedied, and at the same time issuing further

cautionary instructions regarding the excision of immaterial and prejudicial matter from said tapes. At retrial, Petitioner's objection to his prosecution on grounds of double jeopardy was overruled.

This case should not have been remanded for retrial; the prosecution had failed to introduce sufficient evidence to prove its case as a matter of law. Thus retrial of petitioner was in violation of the double jeopardy clause of the Fifth Amendment, made applicable to the states by the due process clause of the Fourteenth Amendment. Burks v. United States, 437 U.S. 1, 16-18, (1978), Greene v. Massey, 437 U.S. 19, 25, (1978), Hudson v. Louisiana, 450 U.S. 40, 45, (1981), Benton v. Maryland, 395 U.S. 784, 794, (1969).

That the Appellate Division did not consider the double jeopardy consequences of its order remanding the case for retrial is clear from its opinion which does not specifically address the consequences of its ruling that the tapes were inadmissible. "Buddy" Mann's testimony standing alone, was insufficient as a matter of law to support the conviction of petitioner. The Appellate Division rendered its decision after Burks v. United States, supra, and Greene v. Massey, supra, but before Hudson v. Louisiana, supra, was decided by this Court.

The rationale supporting the rule that the double jeopardy clause acts to bar retrial where the first conviction is reversed on appeal for insufficient evidence is irresistable, and its

application to this case clearly appropriate. Here reversal was required because the prosecution failed to introduce sufficient testimonial evidence to provide the legal foundation for admission of allegedly corroborative evidence without which the verdict was incorrect as a matter of law. Where, as here, an appellate court determines that as a matter of law there was insufficient evidence to support the jury's verdict of guilty, it has the same effect as a verdict of acquittal. Burks v. United States, supra, at 16, Hudson v. Louisiana, supra, at 43, Tibbs v. Florida, 457 U.S. 31 (1982). An acquittal, of course, has special significance and bars retrial on the same charge completely. United States v. Ball, 163 U.S. 662, 671, Peters v. Hobby, 349 U.S.

331, 344-345. It would be sheer harassment to subject a criminal defendant to repeated trials after he had already been acquitted, Tibbs v. Florida, supra, not to mention a total waste of resources of our society.

Furthermore, our founding fathers made a policy decision that the common law right to be free from successive prosecutions for the same offense was a right of such significant proportions as to be accorded Constitutional status. Green v. United States, 355 U.S. 184, 200-203 (1957) (dissent, Frankfurter, J.) This Court, through its decisions in Burks v. United States, supra, and Greene v. Massey, supra, has implemented

> the principle that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply

> evidence which it failed to muster in the first proceeding." [cite omitted] This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance. Tibbs v. Florida, supra, at 41.

Petitioner submits that he has indeed been subjected to the unfair burden of "repeated prosecutorial sallies", since the same policy determinants apply to this case as apply in cases where the verdict is reversed on appeal, without more, on the ground of insufficiency. That an appellate court states its reasoning with greater specificity should not change the result, whether it is determined on the basis of the

record as a whole or a specific evidentiary rule.

CONCLUSION

Petitioner submits that the petition herein presents substantial questions of Constitutional law one of which has not been but should be decided by this Court and the otheres of which involve a decision of the court of law resort in the State of New York determining federal questions in ways which are in conflict with applicable decisions of this Court. Wherefore, petitioner prays

that this Court exercise its discretion and grant this petition for Writ of Certiorari to the Court of Appeals of the State of New York.

DATED: April 16, 1984

Respectfully submitted,

THE LAW FIRM OF DANIEL P. FOSTER, P.C.
Attorneys for Petitioner

Of Counsel:

KIT CONELLY DECIOUS

APPENDIX

Certificate of the Court of Appeals, State of New York, Denying Leave

State of New York
Court of Appeals

BEFORE: HON. MATTHEW J. JASEN,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ABRAHAM RODRIGUEZ,

Appellant.

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be

reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
February 16, 1984.

Matthew J. Jasen
Associate Judge

*Description of Order: Order of Appellate Division, Fourth Department, entered December 16, 1983, modifying Supreme Court, Wayne County, judgment entered April 16, 1981.

Decision of the Appellate Division of the Supreme Court, Fourth Judicial Department on Appeal from Judgment on Retrial

No. 1010

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: HANCOCK, J.P., DOERR, GREEN, O'DONNELL, MOULE, JJ.

People of the State of New York,

Respondent,

-v-

Abraham Rodriguez,

Appellant.

The above named Abraham Rodriguez having appealed to this Court from a judgment of the Supreme Court, entered in the Wayne County Clerk's office on

April 16, 1981 and said appeal having been argued by Charles Steinberg of counsel for appellant, John Nesbitt of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously modified by vacating the sentence imposed and as modified the judgment is affirmed, and the defendant is remanded to the Supreme Court, Wayne County, for resentencing, in accordance with the Memorandum herein, which is hereby made a part hereof.

Entered: Dec 16, 1983

Carmen S. Leone,

Clerk

MEMORANDUM OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT

1010. (Wayne Co.) -- People of the State of New York, Respondent, v. Abraham Rodriguez, Appellant. -- Judgment unanimously modified by vacating the sentence imposed and as modified affirmed, and defendant remanded to Supreme Court, Wayne County for resentencing, in accordance with the following Memorandum: Defendant was convicted by a jury after a retrial (see People v. Rodriguez, 78 AD2d 769) of arson, second degree, arising from the alleged hiring of another to burn a building. On appeal, among several grounds for reversal, he argues that he was deprived of his constitutional right to the effective assistance of counsel because the court would not

assign him a different attorney and would not permit him to represent himself pro se. On January 30, 1981, the day set by the court for commencement of the trial, defendant sought to have his court-appointed attorney, Mr. Gilmore, who had conducted the appeal after defendant's first trial, replaced. The court granted an adjournment over the prosecutor's objection to permit defendant to retain his own private counsel. On March 23, 1981, after it appeared that defendant's efforts to secure counsel had not been successful and that he would need court-assigned counsel, he again objected to Gilmore, claiming that he had not moved for a reduction of bail or made certain other motions and also claiming for the first time that Gilmore had a conflict of interest. It appeared

after inquiry by the court that defendant's statements concerning the bail hearing and other motions were unfounded; and the only basis for the alleged conflict was that Gilmore and attorney Villani, the owner of the building which had been burned, had been partners seven years earlier for a two-year period during which Villani did not own the building, an association to which defendant had not objected when Gilmore had discussed it with him prior to representing him on the appeal. There is no suggestion that Gilmore had or ever had had any interest (either through legal representation or involvement in business or financial matters) which would conflict with his representing defendant. The court, accordingly, denied the motion to discharge Gilmore but gave defendant

an additional short adjournment upon his representations that he had talked with an attorney, Mr. Mackler, who had agreed to take over the defense. On March 25, 1983 (sic) it appeared that no lawyer including Mackler had been retained by defendant and jury selection began on that day. When voir dire had been in progress for some time, defendant again requested that the court assign a different attorney and moved to represent himself pro se. The court declined to discharge Gilmore and to permit defendant to assume responsibility for his defense by proceeding pro se. It did, however, decide to allow defendant to participate in his trial by asking questions of prospective jurors, examining witnesses, after they had been questioned by Gilmore, calling his own witnesses and

making a summation after Gilmore had made his. It declined to permit defendant to make an opening statement.

We find no error in the court's refusal to discharge attorney Gilmore and to substitute another court-appointed attorney in his place (see People v. Sawyer, 57 NY2d 12, 18-19). While an indigent defendant has a right to a court appointed lawyer, he does not have a right to his choice of assigned counsel (People v. Sawyer, supra, pp 18-19) or to have his assigned counsel removed unless good cause for removal is shown (People v. Sawyer, supra). We find in this record no support for any of defendant's complaints concerning the handling of the matter by attorney Gilmore, an experienced criminal trial lawyer who had served as a public defender. We agree

also with the court's conclusion that Gilmore's past association with Villani did not constitute a conflict of interest requiring his removal.

The court also properly denied defendant's request to proceed pro se. Defendant, who throughout the trial requested assignment of a different attorney, never made an "unequivocal" (People v. McIntyre, 36 NY2d 10, 17) request to defend pro se. Nor was there a knowing and voluntary waiver of defendant's right to counsel. On the contrary defendant consistently stated that he wanted the assistance of a lawyer but not the lawyer that had been assigned. Moreover, defendant, although ostensibly seeking the right to proceed pro se, repeatedly made statements for the record pertaining to his lack of education, his

language difficulties and his lack of experience and ability in courtroom procedures which would have made it error to have granted his request (see People v. McIntyre, supra, p. 17).

Although defendant does not raise the issue, we note that there was no error of law in allowing defendant to participate in his own defense. While a defendant who is represented by counsel in a criminal case has no absolute right to participate, the court may, in the exercise of its discretion, permit participation by the defendant to the extent it finds it appropriate (see People v. Richardson, 4 NY2d 224, 228-229; People v. Hazen, 94 AD2d 905; People v. Powell, 98 Misc 2d 460; Ann. 77 ALR2d 1233). Under the particular circumstances of this case, we find no abuse of discre-

tion in the permission to participate granted to defendant, who was being advised and assisted by several friends and who, despite his protestations to the contrary, appears to have been experienced and knowledgeable in matters pertaining to the defense of a criminal case. Inasmuch as defendant did not waive his constitutional right to representation and did not proceed in his defense without the assistance of counsel, an inquiry for the purpose of ensuring that defendant's waiver was competent, intelligent, and voluntary (see People v. McIntyre, supra, p 17) was not called for (see People v. Hazen, supra, p. 908, Mahoney, P.J., concurring).

It should be noted that defendant does not argue that he was deprived of a fair trial by being permitted to parti-

pate in his own defense. Rather, he argues that he was prejudiced by the court's denial of his requests to discharge Gilmore and to proceed pro se. We cannot agree. There is no basis for faulting Gilmore's conduct of the trial. Despite the difficulties of representing a client who was openly antagonistic toward his counsel and the court, Gilmore succeeded in presenting a coherent defense, which, contrary to defendant's assertions, did not undercut but supported the theory offered by defendant. Any confusion or disharmony that may have resulted from the joint representation we think must be charged not to Gilmore but to defendant's participation and the defense tactics he adopted over which Gilmore had no control. We cannot conclude on this record that the defense presented by

Gilmore and defendant, viewed as a whole, did not amount to "meaningful representation" (People v. Baldi, 54 NY2d 137, 147).

We find the testimony of the accomplice, Harold Mann, to have been sufficiently corroborated and the evidence sufficient to sustain the conviction and reject defendant's arguments to the contrary.

Defendant's sentence of six to 18 years, the minimum of which is more severe than that of his sentence on the first trial (zero to 25 years) is vacated and the matter remitted for resentencing because the court failed to place on the record its reasons for imposing on the retrial a more severe sentence (see North Carolina v. Pearce, 395 US 711, 726). We have examined the

other points raised by defendant and find them to be without merit. (Appeal from Judgment of Supreme Court, Wayne County, Curran, J.--Arson, 2nd degree.) Present: Hancock, J.P., Doerr, Green, O'Donnell, Moule, JJ.

Decision of the Appellate Division of the Supreme Court, Fourth Judicial Department

No. 594

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: DILLON, P.J., HANCOCK, SCHNEPP, DOERR, MOULE, J.J.

People of the State of New York

Respondent,

-v-

Abraham Rodriguez,

Appellant

The above named Abraham Rodriguez having appealed to this Court from a judgment of the Wayne County Court, entered in the Wayne County Clerk's office on June 18, 1979 and said appeal

having been argued by Thomas Gilmore, of counsel for appellant, John Nesbitt, of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously reversed and a new trial is granted.

Memorandum, which is hereby made a part hereof.

Entered: October 30, 1980

Mary F. Zoller, Clerk

MEMORANDUM OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT

78 APPELLATE DIVISION REPORTS, 2d SERIES; MEMORANDA, Fourth Dept., October, 1980 pp. 769-770

11 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ABRAHAM RODRIGUEZ, Appellant.--Judgment unanimously reversed, and new trial granted. Memorandum: Defendant appeals from his conviction after a jury trial of arson, second degree, stemming from a fire on August 16, 1978 which substantially destroyed a building known as the Villani building located in Lyons, New York. At trial, Harold Mann testified that defendant offered to pay him $100 for burning the Villani building, that he

did burn the building, and that defendant later gave him some money. Mann subsequently contacted the FBI and agreed to help obtain evidence in exchange for immunity. Thereafter, FBI agents wired him with a tape recorder equipped with a transmitter which permitted the agents to monitor the conversation in a nearby vehicle. On both occasions, Mann met with defendant and taped the ensuing conversations. The People did not attempt to lay the foundation for admission of the tapes by eliciting testimony of Mann concerning the contents of the two conversations but rather by introducing the testimony of FBI Special Agents Coyne and Puckett and Wayne County Sheriff's Department Criminal Investigator Pisciotti who monitored the conversations. Agent Coyne and Investigator Pisciotti testi-

fied that on September 8, 1978, while parked nearby, they heard over the radio only part of the conversation between defendant and Mann. Investigator Pisciotti stated that the sound "fadded (sic) in and out" and at times was inaudible. Agent Coyne stated that he also monitored the second recording on September 15, 1978 but could not specifically recall the conversation which took place. Agent Puckett, who accompanied Agent Coyne on that occasion, stated after listening to the tape which was admitted into evidence that it was a tape of the conversation he heard on September 15. Over objection, the court permitted the jury to hear redacted versions of the two tapes. This was error. A foundation for admission of a recording not within the purview

of CPL article 700 may be established by the testimony of a participant to the conversation or of someone who heard a simultaneous transmission thereof to the effect that "the conversation has been accurately and fairly reproduced" (People v. McGee, 49 NY2d 48, 60; People v. Arena, 65 AD2d 182, affd 48 NY2d 944; People v. Goldfeld, 60 AD2d 1, 8-9). Here, Mann, the only participant to the conversations with defendant, did not testify concerning the substance of the conversations. The testimony of the officers who monitored the conversations is insufficient to establish that the tapes and transcripts "accurately and fairly reproduced" the conversations between Mann and defendant. Neither officer who monitored the September 8 conversation heard the complete exchange

and neither testified that the portions he did hear were accurately and fairly represented by the tapes. One officer who was present when the September 15 conversation was recorded did not recall having heard the conversation as reflected in the transcript and the other, although he recalled hearing the exchange, did not testify that the tape was a fair and accurate representation of what he heard. Therefore, the foundation for admission of the tapes was insufficient. We find the other points raised by defendant to be without merit. If the tapes are admitted upon retrial, the court should scrutinize the tapes and redact those portions which in its opinion are not relevant as admissions or proof of the crime in question and which relate to uncharged crimes. (Appeal from judgment

of Wayne County Court--arson, second degree.) Present--Dillon, P.J., Hancock, Jr., Schnepp, Doerr and Moule, JJ.

INDICTMENT OF THE GRAND JURY

OF THE COUNTY OF WAYNE

STATE OF NEW YORK COUNTY OF WAYNE

COUNTY COURT RECONVENED SEPTEMBER 1978

The People of the State of New York

-vs-

Abraham Rodriguez,

Defendant.

THE GRAND JURY OF THE COUNTY OF WAYNE by this indictment accuse the defendant of the crime of ARSON IN THE SECOND DEGREE in violation of Section 150.15 of the Penal Law, committed as follows:

The defendant, in the County of Wayne on or about August 16, 1978,

intentionally damaged the building of Anthony Villani by starting a fire when another person not a participant in the crime was present in the building at the time, to wit, a second-floor tenant, and the defendant knew that fact, or the circumstances were such as to render the presence of the tenant therein a reasonable possibility.

Steven M. Sirkin

Wayne County District Attorney

FELONY COMPLAINT

STATE OF NEW YORK : COUNTY OF WAYNE

VILLAGE COURT VILLAGE OF LYONS

The People of the State of New York

against

Abraham Rodriguez

Defendant

John S. Lese, residing at Broad Street, Village of Lyons, by this information makes written accusation as follows:

That Abraham Rodriguez on the 16th day of August, 1978 during the early morning hours in the Village of Lyons, County of Wayne, New York, did commit the offense of ARSON IN THE THIRD DEGREE a felony in violation of Section 150.10 (1) of the Penal Law of the State of New

York, in that he did, at the aforesaid time and place* Count One: A person is guilty of arson in the third degree when he intentionally damages a building by starting a fire or causing an explosion.

The facts upon which this information is based are as follows:
That the defendant did during the early morning hours of August 16, 1978, intentionally damage a building by starting a fire to a building belonging to Anthony Villani, located at 17 Broad Street, in the Village of Lyons, knowing at the time that he had no right or permission to do so.
That this information is based on information and belief, the source of my information and grounds for my belief being my investigation of said crime.

The foregoing factual allegations are based upon personal knowledge of the complainant (and upon information and belief, the sources of complainants information and belief being,

).

Statutes Involved

Fifth Amendment to the United States Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensa-

tion."

Sixth Amendment to the United States Constitution.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment to the United States Constitution, Section One.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Criminal Procedure Law of the State of New York, Section 60.22, subdivision one.

Rules of Evidence; corroboration of accomplice testimony.

"A defendant may not be convicted of

any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense."

Criminal Procedure Law of the State of New York, Section 60.22, subdivision two.

Rules of Evidence; corroboration of accomplice testimony.

"An 'accomplice' means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:

(a) The offense charged; or

(b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.

Criminal Procedure Law of the State of New York, Section 200.70, subdivision one.

Indictment; amendment of

"At any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits. Where the accusatory instrument is a superior court information,

such an amendment may be made when it does not tend to prejudice the defendant on the merits. Upon permitting such an amendment, the court must, upon application of the defendant, order any adjournment of the proceedings which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense."

Criminal Procedure Law of the State of New York, Section 200.70, subdivision two.

Indictment; amendment of

"At indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it; nor may an

indictment or superior court information be amended for the purpose of curing:

(a) A failure thereof to charge or state an offense; or

(b) Legal insufficiency of the factual allegations; or

(c) A misjoinder of offenses; or

(d) A misjoinder of defendants."

Penal Law of the State of New York, Section 15.05, subdivision one.

Culpability; definitions of culpable mental states.

"The following definitions are applicable to this chapter:

> Intentionally. A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."

Penal Law of the State of New York, Section 20.00.

Criminal liability for conduct of another.

"When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."

Penal Law of the State of New York, Section 105.05.

Conspiracy in the fifth degree.

"A person is guilty of conspiracy

in the fifth degree when, with intent that conduct constituting:

1. a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct; or

2. a crime be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

Conspiracy in the fifth degree is a class A misdemeanor."

Penal Law of the State of New York, Section 105.10.

Conspiracy in the fourth degree.

"A person is guilty of conspiracy in the fourth degree when, with intent

that conduct constituting:

1. a class B or class C felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct; or

2. a felony be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

Conspiracy in the fourth degree is a class E felony."

Penal Law of the State of New York, Section 150.05, subdivision one.

Arson in the fourth degree.

"A person is guilty of arson in (sic) fourth degree when he recklessly damages a building or motor vehicle

by intentionally starting a fire or causing an explosion.

Arson in the fourth degree is a class E felony."

Penal Law of the State of New York, Section 150.10, subdivision one.

Arson in the third degree.

"A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

Arson in the third degree is a class C felony."